No.86-1617

In The Supreme Court of the United States

October Term, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

vs.

LORRAINE POLASKI, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SOUTHERN MINNESOTA REGIONAL LEGAL SERVICES, INC.
Mark A. Bohnhorst
Litigation Coordinator
[Counsel of Record]
700 Minnesota Building
46 East Fourth Street
St. Paul, Minnesota 55101
(612) 228-9823

MID-MINNESOTA LEGAL ASSISTANCE
Laurie Davison
Litigation Director
222 Grain Exchange Building
323 Fourth Avenue South
Minneapolis, Minnesota 55415
(612) 332-1441

Attorney for Respondents

1987 Executeam Companies, Inc., 93 W. Little Canada Rd., St. Paul, MN 55117-(612)483-8793/1-800-328-8322

QUESTION PRESENTED

This case is an Eighth Circuit-wide class action brought under 42 U.S.C. §405(g) to challenge the Secretary's former policy for evaluating pain in determining eligibility for disability benefits under the Social Security Act. On appeal, the Secretary agreed to follow the law of the Circuit respecting the evaluation of pain, and that agreement permitted resolution of the case as to most members of the plaintiff class.

The only question presented to the Court at this stage in the litigation is whether the court of appeals erred in waiving the exhaustion requirement for a small subclass (some 600-900) of claimants for

disability benefits, when (a) in determining the eligibility of these (and other) class members, the Secretary had applied an unlawful policy which was at variance with the procedures the Secretary himself should apply and which irreparably injured the members of the class, and (b) all such persons afforded relief had live claims pending at the time the class claims were filed.

PARTIES TO THIS PROCEEDING

The scope of the class is much narrower than that set forth in the Petition. Pet. II-III. The portion of the class which retains an interest in the petition for certiorari excludes (1) persons whose benefits were terminated, App. 11a (dismissing claims), (2) persons who have been evaluated subsequently under lawful standards, App. 25a (persons decided since July 17, 1984 re-decided under proper standard), and (3) residents of Missouri, who are subject to a separate suit. App. 55a (excluding members of other certified class actions). The portion of the class affected by the petition for certiorari includes only the following, App. 54a-55a, 87a:

A. Persons whose applications for Title II and/or Title XVI disability benefits were denied on medical or medical/vocational grounds within the following time periods:

1) in Minnesota, North Dakota, South Dakota and Nebraska, those persons who received an adverse decision between January 30, 1984 and July 16,[1] 1984;

2) in Arkansas, those persons who received an adverse decision at the ALJ or Appeals Council levels between February 20, 1984, and July 16, 1984; and

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[1] The court of appeals limited the class period to July 16, 1984.

3) in Iowa, those persons who received an adverse decision between November 26, 1983[2/] and July 16, 1984; and

B. Who alleged they were unable to work in whole or in part because of pain or other subjective complaints; and

C. Whose claims were not readjudicated subsequent to July 16, 1984.

[2/] The earlier date for Iowa is based on an earlier-filed state-wide class action. App. 53a. For those claimants, §405(g)'s 60-day period extends back an additional two months.

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No. 86-1617

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Otis R. Bowen, Secretary of Health and Human Services, Petitioner,

v.

Lorraine Polaski, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's statement omits the March 1, 1985 order of the court of appeals, finding that the position of the Secretary with respect to the former pain standard was not substantially justified

under 28 U.S.C. §2412(d)(1)(A). Resp. App. 1ra-5ra.

STATEMENT OF THE CASE

The petition seeks review of the judgment of the court of appeals, which partially affirmed a preliminary injunction directing the Secretary to provide notice relief to class members whose claims of disabling pain had been decided under an illegal policy. Both the district court and the court of appeals found that a systematic procedural irregularity had inflicted irreparable harm on the class. The illegal policy denied claimants the individualized consideration which the law requires and precipitated a constitutional confrontation between the Secretary and the courts.

The notice relief ordered by the court of appeals requires neither timetables nor payment of benefits to persons who are not disabled. The order will result in the reopening of some 600 to 900 claims for re-evaluation and the mooting of the constitutional conflict. The class members whose claims will be reopened all had live and non-time barred claims when the class claims here, and in the predecessor Iowa class action raising identical issues, were filed.

A. The District Court Proceedings as to the Pain Issue.

On April 3, 1984 respondent Polaski moved the district court to amend her complaint seeking reversal of the Secretary's denial of disability benefits. The amended complaint sought class-wide relief

in order to resolve and end the on-going furor within the Eighth Circuit concerning the Secretary's policy for evaluating pain. App. 5a, 50a, 58a-59a.

Polaski sought relief on behalf of a narrowly defined class which included only those persons who fell within the short sixty-day statute of limitations specified by 42 U.S.C. §405(g).[3/] Class respondents sought to resolve this on-going controversy in the most expeditious manner possible. They sought: (1) a temporary restraining order to preserve the status quo, i.e., an order halting the continuing issuance of decisions under assertedly illegal standards; and (2) a

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3/ The sixty-day period has been extended by five days pursuant to the Secretary's regulation, allowing additional time for mail. 20 C.F.R. §§404.901, 416.1401.

preliminary injunction to require adjudication of cases under lawful standards.

On April 17, 1984, the district court granted respondents' request for a temporary restraining order. App. 40a, 47a. The district court promptly set the matter for hearing on the motion for a preliminary injunction. In the nine (9) days that elapsed from the court's order allowing amendment of the complaint to the hearing on the motion for a preliminary injunction, the parties did not engage in discovery. The preliminary injunction motion was submitted to the district court on affidavits and on the briefs and arguments of counsel.

A central question the preliminary injunction motion presented was whether the Secretary had adopted a practice that

allegations of pain should be disregarded unless they were fully corroborated by the objective medical evidence, i.e., unless the claimant could establish a cause and effect relationship between the objective evidence and the degree of symptomatology which he experienced. App. 56a-57a. The Secretary asserted that such a policy did not exist and that he was following Eighth Circuit law, which requires careful and individualized evaluation of each claim. The Secretary stressed that his regulation, 20 C.F.R. §404.1529, required only a "reasonable" relationship between objective findings and symptoms. App. 58a-60a.

The district court found against the Secretary on this issue. It concluded the Secretary did in fact require claimants to establish not only the

presence of symptoms, but also the severity of the symptoms, through objective medical evidence. This conclusion was based in part upon a detailed analysis of Social Security Ruling 82-58. App. 61a. The holdings of the district courts and the court of appeals in case after case provided further support. App. 56a-59a. Those cases involved appeals from decisions of the ALJs or Appeals Council, the point at which the Secretary had applied his expertise to assure that his policies were uniformly and correctly

applied. [4] The reported cases evidenced the Secretary's systematic requirement that subjective complaints be fully corroborated by objective medical evidence.

In addition, the affidavit evidence included two cases which had been remanded from district court. In each case the Appeals Council, using apparently boilerplate language, required that the ALJ not

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[4] The Solicitor General has described the function of the Appeals Council as follows:

"The ALJ and Appeals Council stages . . .furnish the Secretary with her principal opportunity to apply her expertise and correct errors by the state agency. . . .

"Centralized review by the Appeals Council in turn serves to ensure that the complex statutory and regulatory provisions are correctly and uniformly applied by the approximately 800 ALJs." Brief for the Petitioners, at 13-14, 31, Heckler v. City of New York, No. 84-1923.

find a disability unless the medical signs and findings supported both the symptoms "and the degree of symptomatology alleged." App. 61a-63a.

Based on the affidavit record, the district court also found that the class was suffering irreparable harm as a result of the Secretary's policy. The district court found:

> It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing - all of which aggravates their medical conditions. They begin to think of suicide. They even die from the very disabilities the agency denies they have. App. 68a-69a.

Based on the evidence adduced, the ongoing tide of reversals in the courts, App. 50a, and the Secretary's avowed policy of non-acquiescence, App. 63a-65a, on April 27, 1984 the trial court entered a preliminary injunction. Although it criticized them, App. 59a-61a, the district court did not invalidate either the regulation or the Social Security Ruling. The district court did make a preliminary finding that, notwithstanding the Secretary's denials, a standard contrary to the requirements of Eighth Circuit law and of the Social Security Act was being applied within the circuit. App. 65a.

B. The Court of Appeals Proceedings as to the Pain Issue.

On appeal and at the urging of the court, App. 31a, the parties entered into a settlement concerning the standard for evaluating pain in the Eighth Circuit, a standard which the Secretary concedes reflects the proper method for evaluating pain under the Act. App. 16a-17a. Significantly, that standard, agreed to by the parties, includes the following language which is directly contrary to the directives which the Appeals Council had been issuing to ALJs within the circuit:

> . . .direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the

> **objective medical evidence does not fully support them.**

App. 14a.

The Eighth Circuit initially approved the settlement as a correct statement of the law and directed the Secretary to continue to adhere to those standards in adjudicating cases within the Eighth Circuit. App. 20a, 30a-34a.

Following the parties' agreement on the pain standard to be applied, the court of appeals issued its decision on December 31, 1984. After disposing of both the medical improvement issues and the prospective pain issues, App. 8a-21a, the court turned to the matters which are now raised in the petition for certiorari. This, the most critical portion of the decision

below, App. 21a-27a, the Secretary largely ignores.[5/]

The district court's preliminary injunction order had been based on findings of irreparable harm and of an unlawful standard. App. 52a, 56a-65a, 68a-71a. The court of appeals addressed these two findings in turn. First, the court affirmed the trial court's finding of potentially irreparable harm. App. 23a-24a.

Second, for various reasons the court found no basis to overturn the finding of an unlawful policy. Plaintiffs alleged the systematic application of an unlawful standard. Defendant himself

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[5/] The sole references in the entire Petition are (1) a citation to the page numbers, Pet. 10, and (2) a brief reference to the finding of irreparable harm, Pet. 18.

admitted that his published ruling could be "misinterpreted" as embodying that very standard and that at least "some adjudicators" had been systematically employing the unlawful standard. App. 24a.

In addition, the court interpreted its own pain cases as meaning exactly what the district court had found them to mean: the Secretary was failing ". . .to follow the proper pain standard. . ." App. 24a; 58a-59a. The court also construed its own

100% reversal rate[6/] as probative of the existence of an unlawful standard, of a "procedural irregularity" such as that identified in Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983). App. 24a-25a. The court stated that class members whose cases had been decided before July 17, 1984, and had

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[6/] Although not available at the time, district court statistics confirm the extraordinarily high reversal rates. Nationally during this period district courts were reversing or remanding 86% of cases and affirming only 14%. OHA Fact Sheet for Fiscal Year 1984, at 6, Social Security Administration, Office of Hearings and Appeals, SSA Pub. No. 70-039, May 1985. Compare Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983). (80% reversal rate). In view of the raging controversy which was well known to judges, magistrates and counsel, it is likely that the reversal rate for the class at least equaled the national statistics for the period.

not been re-decided, were not adjudicated under the proper standard. App. 25a.

In addition to affirming the factual foundations[7] for the preliminary injunction, the court of appeals analyzed the legal requirements of 42 U.S.C. §405(g). The court interpreted the statute on the basis of its prior decision in the seminal Mental Health litigation and on the basis of the Second Circuit's analysis in City of New York v. Heckler, 742 F.2d 729 (2nd Cir. 1984), aff'd., Bowen v. City of New York, No. 84-1923 (June 2, 1986), both of which had applied the principles enunciated in Mathews v.

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[7] The dissent felt the factual support for the existence of an unlawful policy was not so strong here as in Mental Health. App. 29a. The dissent did not suggest, however, that the finding was an abuse of discretion.

Eldridge, 424 U.S. 319 (1976). App. 21a-23a, 25a-26a.

The court found that §405(g) requires a pragmatic analysis consistent with the underlying policies of exhaustion. App. 23a. The court determined that, since class members were not seeking the award of benefits but were challenging the standards applied, their essentially procedural claim was sufficiently collateral to bring the case within the requirements of Mathews v. Eldridge. App. 26a. The court noted that the class was narrowly tailored to conform to the sixty day requirement of §405(g) and remanded to provide a notice relief to class members who still claimed to be disabled and had not been readjudicated. App. 26a-28a.

The Secretary filed a petition for a writ of certiorari, which this Court held pending its decision in Bowen v. City of New York. In City of New York, this Court analyzed the requirements of §405(g) in the same way as had the court of appeals. The Court subsequently granted certiorari in this case, vacated the judgment and remanded for reconsideration in light of City of New York.

In a subsequent order the court of appeals, through a now unanimous panel,[8] held that there was no reason to amend the majority's prior opinion. App. 1a-2a.

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[8] Prior to City of New York the panel had been divided. App. 28a-29a. In addition, three (3) judges had originally voted to grant rehearing en banc. App. 101a. After City of New York, however, the petition for rehearing en banc was denied unanimously. App. 3a.

C. The Class Scope and the Relief.

The relief below involves a notice and an opportunity for readjudication for class members who continue to claim they are disabled. App. 27a-28a. The Secretary says that this will require him to reopen the claims of approximately 8,000 class members, Pet. at 12. That estimate, however, is predicated on significant analytical errors. This figure (the same estimate used below) erroneously assumes (1) that no class members have been reevaluated, and (2) that all persons who receive a notice will request reevaluation. Yet the Secretary admits these assumptions are incorrect. Resp. App. 7ra-8ra.

The data show that from 43% to 71% of persons denied benefits will have been

readjudicated on appeal.[9] "Table 4.-Disability Determinations and Appeals, Fiscal Year 1985", in Background Materials and Data on Programs Within the Jurisdiction of the Committee on Ways and Means, Committee on Ways and Means, U.S. House of Representatives, March 3, 1986. And in other disability class actions only

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[9] Pursuant to counsel's request for summary data under the Minnesota Data Practices Act, the Minnesota Disability Determination Service performed a computer search which showed how many initial application denials entered from January 30, 1984 through July 17, 1984 have been readjudicated within the DDS since July 17, 1984. The computer run showed that 49-50% of such cases had been subsequently readjudicated, whereas the national data for appeals at that level show only a 43% appeal rate. These data indicate that the national data may understate the incidence of readjudications. Thus the overall readjudication rate, rather than being "a bit" over 50% as the Secretary previously admitted, Resp. App. 7ra is more likely in the range of 55% to 60%.

20% to 25% of class members have responded to mailed notices.[10/]

Reducing class size to account for the 55% to 60% of cases which have been readjudicated yields a universe of possible class members of approximately 3,200 to 3,600. Since only those who respond to a notice must be readjudicated, the number of cases which are likely actually to be reopened under the order below is in the range of 640 to 900,[11/] a far cry from 8,000. Even for these 640 to 900

[10/] This information was provided by counsel for claimants in Lopez v. Heckler, Civ. No. 83-0698 (C.D. Cal.) (over 40,000 notices mailed to a circuit-wide class), and in Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986) (over 10,000 notices). The 20% to 25% figure itself is in the mid-range of response rates typically experienced in class actions. See Newberg on Class Actions, 2nd ed., Vol. 2, at 207-215.

[11/] The low range is 3200 x .20; the high range is 3600 x .25.

persons (distributed among the six (6) states covered by the class), there are no requirements as to time limits and no awards of benefits. App. 27a-28a.

REASONS FOR DENYING CERTIORARI

The Secretary's principal argument in support of his petition is that the court of appeals' ruling is in conflict with City of New York. While acknowledging that there is no conflict between the ruling below and that of any other Circuit, the Secretary also cites what he refers to as a "trend of decisions" that, like the decision of the court of appeals below (as the Secretary reads it), threatens the continuing integrity of the

exhaustion requirement in social security cases, and he urges this court to act in this case to stop that "trend."

The first contention (though only the first contention) at least comes within the considerations which U.S. Sup. Ct.Rule 17 indicates may motivate this court to exercise its certiorari jurisdiction. In seeking to advance that argument, however, the Secretary is burdened by a record and a court of appeals decision that can hardly be hidden. He seeks to shed that burden by describing to this court a different case - and offering for review a different question - than the one actually presented. See Section (I). When the question actually presented is understood, it is manifest that there is no conflict between the court of appeals' decision and

City of New York. See Section (II). Finally, the "trend" the Secretary posits is mythical; there is no need for the Court to stem any tide away from the exhaustion requirement, because there is no such tide. See Section (III).

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION THE PETITION PRESENTS.

The petition repeatedly asserts that the court of appeals waived exhaustion for the claims of class members even though it affirmed the policies that had "govern[ed] those claims. . . ." Pet. 11, see also, I, 2, 10, 17. If that had happened, the court of appeals committed palpable and grievous error; and this court, rather than simply granting

certiorari, should grant certiorari and summarily reverse. In truth, however, the Secretary has blatantly misstated what the court of appeals affirmed and ignored what that court found.

The court of appeals affirmed that its own prior decisions interpreting the Social Security Act were correct and that the Secretary's regulation and ruling, when "clarified" in light of those decisions, could be sustained. The court found, however, that the Secretary had not applied those lawful policies to the class members for whom exhaustion was waived. See discussion, pp. 13-16.

The Secretary's incredible assertion that this case does not involve "a finding of an unlawful circuit-wide policy. . .", Pet. 17, rests largely on a

distortion of the settlement agreement. In the agreement the Secretary admitted that "some adjudicators" were following an unlawful policy. The Secretary now twists the admission, re-casting it as if it were the only allegation[12/] and the only finding in the case. This false premise pervades the Petition.[13/]

[12/] The "allegation" that only some adjudicators were confused was the Secretary's allegation, not the plaintiffs'. Neither plaintiffs nor the courts below were bound by the Secretary's assertions of confusion. Cf. Mental Health Association of Minnesota v. Heckler, 620 F.Supp. 261, 267 (D. Minn. 1985).

[13/] The point highlighted in the Petition actually reinforces the correctness of the decision below. The record evidence and district court findings showed that the "some adjudicators" who were systematically following an unlawful policy included the members of the Appeals Council. Given the function served by the Appeals Council, see n. 3, a reasonable inference is that "some adjudicators" includes "all adjudicators".

Such sophistry is not only essential to the Secretary's argument concerning City of New York, it is central to his ancillary arguments as well. Since this case involves findings of an unlawful system-wide policy, and not an individual (or a class) claim for benefits, cases requiring exhaustion where claimants seek such awards, and Congress' incorporation of general exhaustion principles into the Act, are not apposite. Pet. 12-15. Insofar as petitioner suggests that the 1984 Social Security Disability Benefits Reform Act of 1984 rendered the requirements of §405(g) more stringent than they were before, he continues to advance a "perverse" position. City of New York, Slip Op. at 18, n. 14. The Court, having squarely decided that issue last Term,

should not grant certiorari to decide it again.

Petitioner's misstatement of the facts and holdings also leads him to the erroneous assertion that the order below conflicts with Section 3 of the 1984 Reform Act. 42 U.S.C. §§423, 1382c. The court of appeals correctly understood the Act as implementing the policies concerning evaluation of pain which were embodied in the settlement agreement: policies which require careful individualized evaluations and a reasonable relationship between pain and objective findings, not full corroboration or a cause and effect relationship. The court of appeals waived exhaustion because those lawful policies had <u>not</u> been extended to this narrowly defined portion of the class.

II.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' RULING BELOW AND THIS COURT'S DECISION IN BOWEN V. CITY OF NEW YORK.

While a conflict between a court of appeals ruling and a decision of this Court is, of course, a strong basis for the issuance of a writ of certiorari, it is only an "apparent" conflict that ordinarily leads to issuance of the writ. See United States v. Doe, 465 U.S. 605, 610 (1984), see generally, S. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (6th Ed. 1986) at §4.5 (referring to a "direct" and "readily apparent" conflict). But here, there is not only no "apparent" conflict between the court of appeals ruling and City of New York, the

Secretary's contention notwithstanding, there is no conflict at all.

A. This Court's Decision in City of New York.

In Bowen v. City of New York, No. 84-1923 (June 2, 1986), this Court analyzed the §405(g) exhaustion requirement for two groups of class members. First, the vast majority of class members had failed to exhaust their administrative remedies long before the class action was filed.[14/] The clandestine nature of the Secretary's policy was sufficient to

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[14/] The class was comprised of persons whose benefits were denied or terminated from April 1, 1980 through May 15, 1983; suit was not filed until February 8, 1983. City of New York, Slip Op. 7 n. 6, 4. Persons denied or terminated from April 1, 1980 through December 5, 1982 (over 32 months), who did not appeal further, were in the first group. The second group covered a period of less than 5 1/2 months.

justify a summary waiver of exhaustion for the first group. City of New York, Slip Op. 14.

The Court analyzed the exhaustion requirement for the second group (whose claims were still alive when the class litigation was filed) differently. Secretiveness was clearly not an essential element in the Court's analysis.[15/] Far from being confined to the especially outrageous conduct of the Secretary in that case, the Court's discussion of exhaustion in City of New York sets forth the essential parameters for adjudicating cases under §405(g).

The starting point for analysis was Mathews v. Eldridge, which identified two

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15/ The Court adverted to the unrevealed nature of the policy only twice. Slip Op. 17.

factors that bear on the appropriateness of a judicial waiver of exhaustion: (1) that a claim be collateral to the claim for benefits, and (2) that full relief cannot be obtained through exhaustion. Slip Op. 14-16. In City of New York the Court squarely rejected the Secretary's exceedingly restrictive interpretation of each requirement.

First, the Court held that a claim that the Secretary failed to follow the governing rules is "collateral" to the administrative claim for benefits where claimants attack the rules themselves and do not seek an actual award of benefits. Slip Op. 15. The Court thus rejected the Secretary's assertion that only "entirely collateral" claims justify a waiver of exhaustion. Brief for the Petitioner at

35-39, Heckler v. City of New York, No. 84-1923.

Second, the Court addressed the matter of irreparable harm as an essentially factual issue. Slip Op. 15-16. The findings of irreparable harm below were accepted, contrary to the Secretary's assertion that harms associated with pursuing administrative appeals were irrelevant as a matter of Congressional intent. City of New York, Brief for Pet. at 27-29. Indeed, the Court indicated it should be "especially sensitive" to such harms, where the government seeks to require exhaustion as a prerequisite to obtaining the procedure claimants were lawfully entitled to obtain from the outset. Slip Op. 16.

More fundamentally, the Court rejected the Secretary's extraordinarily narrow and rigid overall approach to §405(g) in favor of established and familiar principles of exhaustion:

> Finally, application of the exhaustion doctrine is "intensely practical." Eldridge, 424 U.S., at 331, n. 11. . . . The ultimate decision of whether to waive exhaustion should not be made solely by mechanical application of the Eldridge factors, but should also be guided by the policies underlying the exhaustion requirement.

Slip Op. at 16.

Having established the fundamental principles underlying §405(g), the Court applied those principles to the facts. Those principles would rarely if ever allow waiver of exhaustion to attack ordinary irregularities in the processing

of an individual claim. Slip Op. 16-17. Clearly exhaustion should be waived, however, in the circumstances of City of New York, which presented the Court with an egregious injustice. Slip Op. 17.

Finally, the Court addressed the appropriate form of relief. Requiring that the Secretary merely reopen claims administratively and readjudicate cases under proper standards was entirely appropriate and did not constitute an undue interference with the administrative process. Slip Op. 17.

B. The Court of Appeals' Interpretation of §405(g) was Identical to City of New York.

Petitioner's suggestion of a conflict studiously and inappropriately omits citation to the critical portions of

the decision below. U.S. Sup. Ct. Rule 21.5. Contrary to the Secretary's assertions, the court of appeals in this case not only determined that the Secretary had been applying an unlawful standard, it interpreted and applied the requirements of §405(g) precisely as did this Court in City of New York.

First, the Eighth Circuit understood that the challenge to an unlawful standard is substantially "collateral" to an individual claim for benefits, App. 26a, under the first of the two Mathews v. Eldridge factors. That is the very holding of City of New York on that point, Slip Op. 15, and only by misstating the findings below can the Secretary suggest a conflict. Pet. 17.

Second, the court of appeals affirmed the findings of irreparable harm caused both by the denial of benefits and by pursuit of the administrative process. App. 23a-24a. As in City of New York, those findings are not challenged on appeal.[16/]

[16/] The courts below found, inter alia, that claimants experienced an increase in anxiety and depression and that their conditions worsened. These findings are appropriate, not only because they are unchallenged, but also because the class includes many mentally ill individuals.

The Secretary below interpreted the class to include all mental illness denials. In addition, there is likely to be a substantial mental illness component in many of the pain denials; indeed, the Secretary deferred issuance of certain revised mental illness listings because that very matter was included in the pain study mandated by Congress. 50 Fed. Reg. 35038, 35051, August 28, 1985.

Rather than challenge the findings, the Secretary brazenly misstates them as follows:

> In this case, by contrast, neither court below found that pursuit of the administrative review process would itself cause harm to the instant plaintiffs. Pet. 18.

This is simply a falsehood, App. 23a-24a; 68a-69a; the Secretary's entire argument as to irreparable harm founders on the holdings below.

Third, the Eighth Circuit correctly understood the proper perspective for evaluating §405(g) and the Eldridge factors. The lower court's construction of the statute as requiring a "rather pragmatic" approach, App. 22a-23a, was prescient of this Court's determination to follow an "intensely practical" course.

Slip Op. 16. The Eighth Circuit considered no one Eldridge factor to be critical; this Court held the Eldridge factors should not be mechanically applied. Compare App. 23a with Slip Op. 16. Clearly the essential and important principles of law applied here and in City of New York are the same.

C. The Court of Appeals' Waiver of Exhaustion was Entirely Consistent with City of New York.

Not only does this case involve an unlawful policy inflicting irreparable harm, but many of the additional factual characteristics which this Court noted in City of New York are also present here.

As in City of New York, it is clear that the unlawful policy was inconsistent "in critically important ways", Slip Op.

17, with the established law of the circuit and with the Social Security Act. This was not an insignificant, ancillary or usually harmless policy; rather, it went to the heart of the disability decision-making process. Where the courts determined that the unlawful policy had been followed, they had been required to reverse or remand cases to the Secretary again and again. Layton v. Heckler, 726 F.2d 440, 442 (8th Cir. 1984).

As in City of New York, too, the policy was illegal precisely because it ignored the particular facts of the

individual cases.[17] The unlawful pain standard provided adjudicators with a simplified litmus test, a bottom line rule, to decide pain issues; and adjudicators repeatedly distorted, ignored or failed to develop the facts. Layton, 726 F.2d at 442; Tome v. Schweiker, 724 F.2d 711, 713 (8th Cir. 1984); Basinger v.

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[17] Indeed, the presumption invalidated in City of New York and Mental Health was a particularized application of the general rule involved here. The former mental impairment listings focused solely on the "objective" psychiatric "signs" and "findings", and the unlawful presumption required disability to be based solely on that "objective" basis by determining that anyone who did not meet the listings was capable of substantial gainful employment. The mental impairment presumption thus sought to remove consideration of subjective symptomatology which could not be clearly proved from objective findings in much the same way that the "full corroboration" rule sought to remove consideration of pain or other complaints which could not be entirely explained by objective findings.

Heckler, 725 F.2d 1166, 1170 (8th Cir. 1984); Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983). The effect of the unlawful rule was to deny claimants the searching and individualized analysis based on the full record to which they were entitled.

This case also presents compelling reasons for waiving exhaustion beyond those which were present in City of New York. Here the Secretary's refusal to follow the law of the circuit precipitated a genuine crisis[18/] which rendered exhaustion both futile and unjust.

Because of the Secretary's non-acquiescence, which had been openly

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18/For example, in response to the Secretary's policies, the Governor of the State of Arkansas, acting in defiance of the Secretary's instructions, directed the Arkansas DDS to follow Eighth Circuit law.

assailed by the court of appeals itself, App. 58a-59a, the adjudicative system was burdened with unprecedented levels of appeals and reversals. This result was extraordinarily wasteful and costly to the administrative system. It imposed unwarranted costs, delay and anxiety on claimants and required an unnecessary diversion of advocacy resources. It also resulted in an undue imposition on the scarce resources of the federal courts.

In addition to imposing costs in terms of delay and money, the policy undermined the rule of law. Public confidence in the federal government and in the fairness of the adjudicative system was compromised. Cf. H.R. Rep. 98-616, 98th Cong., 2nd Sess. (1984) at 2, 24-25. In addition, the Secretary's conduct resulted

in a dual system of laws, one system for those with the resources or determination to pursue appeals, and a different system for the uneducated, the unrepresented or the meek.

The implications of this crisis with respect to the question of exhaustion are three-fold. First, because many individuals or advocates were aware of the furor, large numbers of individuals did appeal their cases. The scope of the class for whom the exhaustion issue is critical is correspondingly limited.

Second, those who did allege significant pain not fully corroborated by objective tests, and who did not exhaust their administrative remedies, are most likely to be the uninformed, the unrepresented and the emotionally or

mentally impaired.[19] Since the Social Security system was designed to be unusually protective of the rights of such claimants, City of New York, Slip Op. 11-12, a waiver of exhaustion for a limited group of such persons is entirely consistent with the fundamental purposes of the Act.

Third, since the Secretary was put on notice of the unlawful policy by the court of appeals itself over eight (8) months before the class claims were filed, Nelson, 712 F.2d at 346, every member of the class could have been lawfully adjudicated from the outset had the Secretary

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[19] The Secretary does not allege that he informed such claimants of his unlawful policy (which he denies ever existed), and the assertion that such individuals "knowingly" abandoned their claims is particularly unwarranted.

simply responded appropriately. Instead, the Secretary waited to act until faced with a circuit-wide class. Here waiver of exhaustion requires only that the Secretary take corrective measures which he both could and should have initiated on his own with respect to these very class members. Compare City of New York, Slip Op. 17.

The Court has directed that exhaustion principles be applied in an "intensely practical" manner. City of New York, Slip Op. 16. Considering the finding of irreparable harm, the finding of a system-wide policy, the critically important impact of that policy on disability decisions, the circumvention of the individualized review to which individuals are entitled, and the extra-

ordinarily wasteful and unjust results of the Secretary's conduct, the court of appeals acted well within the range of its broad discretion in waiving exhaustion for a very narrow class.

D. The Scope of Relief Ordered Below Was Entirely Consistent With City of New York.

The relief ordered in this case is far less intrusive than that awarded in City of New York, for it involves no interim benefits and only a notice/opt-in procedure.[20] App. 27a-28a.

This relief was particularly appropriate because it effectively terminated further litigation over a constitu-

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[20] City of New York (and Mental Health before it) required not only interim benefits but also the affirmative reopening of all cases, regardless of whether class members responded to a notice.

tional confrontation between the Secretary and the courts and did so in the least intrusive manner possible. Here, the court of appeals not only took the unusual step of urging the parties to settle and avoid the constitutional conflict, its subsequent opinions leave no doubt that the court was directing that the matter should be considered resolved once notice relief was extended to the limited portion of the class which remained. App. 26a-28a; Resp. App. 1ra-3ra. By thus allowing the case to become moot without requiring an ultimate confrontation over the issue

of non-acquiescence,[21] the court of appeals was acting in the highest tradition of judicial restraint.

The alternative to notice relief would have been a remand for complete discovery and a trial concerning weighty and

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[21]Of course, the Secretary remains free to attempt to insist on a constitutional showdown on remand, if he wishes to do so. Numerous factors might induce the Secretary to act with restraint, including (1) the numbers of persons responding to notice relief will be small, as the Secretary well knows; (2) the cost of circuit-wide discovery may be substantial; (3) Chief Judge Alsop (to whom the case is now assigned) will have broad authority over the content and timing of discovery and the timing of trial; (4) if the Secretary insisted on trial, he might open up the issue of tolling the 60-day statute of limitations; and (5) the Secretary himself may wish to avoid ultimate constitutional issues. That the Secretary's choice is a difficult one, however, does not argue for a grant of certiorari. It goes without saying the Court should not grant certiorari in order to simplify a party's tactical litigation decisions, especially when that party has not sought certiorari on that basis.

far-reaching constitutional questions. In addition, the prospective settlement had already rendered the dispute moot for the great majority of the class, further diminishing the appropriateness of such proceedings.

This court rarely reviews questions of the scope of preliminary injunctions, and where it does so the question "is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). The relief granted was as narrow as possible.[22/]

[22/] More intrusive forms of relief not ordered below but which have been awarded in some other actions include: (1) mandatory reopening of all files; (2) judicial imposition of time limits, (3) interim benefits, and (4) tolling the 60 day statute of limitations.

The court of appeals unquestionably applied the correct legal standards; and its handling of this case, and the relief it allowed [23], were nothing if not intensely pragmatic. Every judge on the court of appeals considers what little remains of this case to be inappropriate for further review. Respondents submit that there is no basis whatsoever for holding that the court of appeals abused its broad discretion in ordering notice relief. That court's wise and restrained order should be left undisturbed.

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[23] The court of appeals significantly curtailed the relief which had been ordered by the district court. Compare App. 27a-28a and App. 76a-84a.

III.

THERE IS NO "TREND" OF DECISIONS THAT IS UNDERMINING THE INTEGRITY OF THE EXHAUSTION REQUIREMENT IN SOCIAL SECURITY CASES.

This Court's decision in City of New York grounded §405(g) jurisprudence upon the well-established principles governing application of the exhaustion doctrine in other contexts. The federal courts are experienced and expert in applying these principles, and there is little or no reason to believe that a substantial or erroneous "trend" of decisions has developed or will develop after City of New York.

Not only is there no conflict in the circuits as to any exhaustion issue this case presents, Pet. 23, there is not

even a conflict between any circuits and any district courts. The Secretary's suggestion that all the lower courts are misinterpreting City of New York argues against a grant of certiorari. It is one thing to suggest that one or a few lower courts are misconstruing a Supreme Court decision; it is a different thing entirely to claim that all the federal courts which have decided the issue are wrong. It is far more likely that it is the Secretary who is mistaken, either about City of New York or about the decisions below.

In fact, there has been a singular paucity of litigation over §405(g) issues since City of New York. The few disability cases which have been decided certainly do not evidence any wholesale tendency of the courts to depart from

settled rules of exhaustion. Hyatt v. Heckler, 807 F.2d 376, 378 (4th Cir. 1986) (exhaustion will rarely be appropriate); Salyers v. Secretary, 798 F.2d 897 (6th Cir. 1986) (dismissing class claims as moot); Hironymous v. Bowen, 800 F.2d 888, 893 (9th Cir. 1986)(refusing to waive exhaustion); and Pratt v. Bowen, 642 F.Supp. 883, 887 (D.D.C. 1986)(affirming prior decision to waive exhaustion).[24/] This is hardly the time to re-visit the principles so clearly enunciated by a unanimous Court last Term.

[24/] In addition to the reported cases, respondents are aware of one unreported case touching these issues. Knight v. Bowen, No. 82-892(K) (D.C. Mass. November 24, 1986)(Keeton, J.). That case turned on the unique fact that the class was comprised of the oldest of SSI beneficiaries, many of whom would die before they could exhaust, and the issue was simply a question of law. Slip Op. 7-9.

Finally, even if there were a trend such as the Secretary claims, this is not an appropriate vehicle for review of the trend. This case arises from a preliminary injunction, and the factual issues are necessarily less fully developed than would be true of other cases. The scope of relief in this case which would result from the waiver of exhaustion (i.e. the reevaluation of some 100 cases per state) simply does not warrant Supreme Court review, particularly where review can only serve to unearth a constitutional confrontation that is best left buried.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Mark A. Bohnhorst
Litigation Coordinator
[Counsel of Record]
Southern Minnesota
Regional Legal
Services, Inc.
700 Minnesota Building
46 East Fourth Street
St. Paul, MN 55101
Telephone (612) 228-9823

Laurie Davison
Litigation Director
Mid-Minnesota Legal
Assistance
222 Grain Exchange Bldg.
323 Fourth Avenue South
Minneapolis, MN 55415
Telephone (612) 332-1441

May 1987 ATTORNEY FOR RESPONDENTS

RESPONDENTS' APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-5085

Lorraine Polaski, et al.,

Appellees,

-vs-

Margaret M. Heckler, Secretary of Health and Human Services,

Appellant.

On Appellees' Motion for Costs and Attorneys' Fees.

Filed March 1, 1985

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

O R D E R

On December 31, 1984, this Court issued its final opinion on this lengthy

litigation concerning the construction of the Social Security Act by the Secretary of Health and Human Services (Secretary). Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984). The plaintiffs now seek attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. §2412(b) & (d).

We find an award for attorneys' fees and costs appropriate under section 2412(d), which provides that fees and costs shall be payable to a prevailing party

> in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances made an award unjust.

28 U.S.C. §2412(d)(1)(A).

In this litigation, the plaintiffs succeeded in gaining significant relief for a large class of Social Security disability benefits claimants. Their lawsuit was the catalyst for resolution of a controversy over the Secretary's evaluation of pain and other subjective complaints--a controversy in which the Secretary had been reserved by our Court time after time, and failed ever to appeal our decisions to the United States Supreme Court.

To this degree, we find the Secretary's position in this litigation was not substantially justified, see Cornella v. Schweiker, 728 F.2d 978, 981-85 (8th cir. 1984), and that attorneys' fees and costs should be awarded to plaintiffs to reflect this

degree of success, see Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983). We limit the attorneys' fee award to $75 per hour pursuant to section 2412(d)(2)(A). We note further that a significant portion of the time spent in this appeal by plaintiffs' attorneys reflects work on the medical improvement issue, for which it cannot be said that the plaintiffs prevailed or that the Secretary's position was not substantially justified. We thus reduce the attorneys' fees award by one third to reflect the plaintiffs' overall degree of success. Thus, the total attorneys' fees award is $7,752. We also grant an award of costs of $335.

FAGG, Circuit Judge, dissenting.

Because I believe the Secretary's position in this litigation was

substantially justified, I dissent from this order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

LORRAINE POLASKI, et al.		
Plaintiffs-Appellees,	*	
	*	
vs.	*	NO. 85-5085
	*	(D. Minn. Civ.
	*	Action No. 4-
MARGARET M. HECKLER,	*	84-64)
Secretary of Health	*	
and Human Services,	*	
	*	
Defendant-Appellant.	*	

AFFIDAVIT OF JEAN HALL HINCKLEY

STATE OF MARYLAND :
:ss.
COUNTY OF BALTIMORE:

I, Jean Hall Hinckley, being duly sworn according to law, depose and say as follows:

1. I am the Acting Deputy Associate Commissioner for Disability, Office of Disability, Social Security Administration, Baltimore, Maryland.

* * * * * * *

[PARAGRAPHS 2-15A HAVE NOT BEEN INCLUDED IN THIS APPENDIX.]

15B. In paragraph 8, Mr. Bohnhorst states his belief that the appellate filing rate averages 50% or a bit more. We do not disagree with his belief. We do disagree, however, with his assumption that the total number of cases to be reworked is equivalent to one-half of those recently adjudicated. While we agree that one-half of those would have to be readjudicated anyway, there is an additional body of cases (those who are not pursuing their appeal rights) which must be addressed. Thus, Mr. Bohnbhorst has understated the total number of potential claims requiring reworking.

* * * * * * *

[PARAGRAPHS 15C AND 15D HAVE NOT BEEN INCLUDED IN THIS APPENDIX.]

15E. In his paragraph 11B, Mr. Bohnhorst is critical of SSA's estimates based on 100% of cases. Our estimates are done with the idea of letting courts know the maximum impact of an order. We do not disagree that it is reasonable to expect less than 100% response to our notices.

* * * * * * * *

[PARAGRAPHS 15F-17 HAVE NOT BEEN INCLUDED IN THIS APPENDIX.]

18. The information contained in this affidavit was secured by various employees of the Social Security Administration and is true and correct to the best of my information and belief.

Jean Hall Hinckley
JEAN HALL HINCKLEY
Acting Deputy Associate
Commissioner for
Disability
Office of Disability
Social Security
Administration

Subscribed and sworn to before

me this 18th day of May, 1984.

/s/
Notary Public

My Commission Expires July 1, 1986.